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No. 82-609

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SEDCO INTERNATIONAL, S.A., SEDCO, INC., and SEDCO ENERGY CORPORATION (formerly TerraMar Consultants, Inc.),
Petitioners,

v.

WILLIAM F. CORY and MARCELLA MCKILLIP, Executors of the Estate of Roy J. Carver, Deceased,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners' Reply

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Petitioners' Reply

I. Attorney-Client Privilege[1]

Respondents' brief (a) fails to address the merits of Carver's waiver of his claim of an attorney-client privilege; and (b) resorts to misstatements of the trial court record in an attempt to justify the rulings below. This

[1] Pursuant to S.Ct.R. 28.1, Sedco has listed all parent companies, subsidiaries, and affiliates of each corporation in Appendix G to Sedco's petition.

reply corrects Respondents' misstatements, with a supporting appendix:

1.a. Respondents incorrectly assert:

> "The contention that Sedco was denied cross-examination is untrue and was never in fact claimed on appeal. Pre-trial, Sedco took two extensive depositions of Carver Only one question pertaining to Carver's attorneys was asked, and no motion to compel answers was ever made."[2]

b. The actual record:

(1) Carver blocked pre-trial discovery by refusing, upon his attorney's instruction, to respond to "[a]nything to do with any conversation" with his attorney.[3]

(2) Contrary to Respondents' assertion, Sedco filed a motion to compel under Fed.R.Civ.P. 37(a) with a supporting brief. (Appendix I)[4] Carver contested this motion. (Appendix J) Carver's pleading then correctly acknowledged the scope of the discovery dispute: "Sedco demands therefore that Carver produce all documents and answer questions concerning communications to and from his attorneys pertaining to business or legal advice." (Appendix J-2) Sedco rejoined, again pointing out the specific ground of Carver's waiver. (Appendix K)

(3) After considering the matter for almost one month, the district court confined discovery to the limited infor-

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[2] "Brief for Respondents," p. 5.

[3] Carver's July 9, 1980 Deposition, Appendix H-1. (This reply)

[4] Sedco's motion and brief expressly pointed out that Carver had waived his claim of attorney-client privilege by claiming reliance upon Sedco. (Appendix I-6-7) The motion prayed that "Carver should be required to disclose the communications to and from his attorneys regarding the information which he actually had at the time of his claimed reliances." (Appendix I-7)

mation mechanically relayed by Carver's lawyers from "independent sources." (Sedco's petition at Appendix C-2, ¶ 2) Contrary to Respondents' assertion in this Court that the district court "sustained this [Sedco's] motion,"[5] Carver again succeeded in blocking interrogation during the trial by reminding the court that, during pre-trial discovery, "[t]he court sustained our objection that this involved privileged matter...." (Appendix L-1)

(4) Contrary to Respondents' assertion, Sedco's very first issue on appeal was:

> "1. Whether the district court erred in precluding (a) pre-trial discovery and (b) consideration during the trial, of suppressed advice Carver had from his own lawyers while claiming he relied upon Sedco."[6]

Sedco's main brief on appeal supported this point with twenty-nine pages of explanation and references to the record (pp. 1-29) and eleven pages of argument and authorities (pp. 33-44).

2.a. Respondents incorrectly assert:

> "Sedco made no offer of proof as required by Federal Rule of Evidence 103(a)(2), nor any showing of prejudice."[7]

b. The actual record:

(1) Denial of pre-trial discovery seriously handicapped Sedco's ability at trial to cross-examine Carver about the advice upon which he actually acted. The additional rulings made during the trial made cross-examination impossible.

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[5] "Brief for Respondents," p. 5.

[6] A copy of page xi of Sedco's brief on appeal, stating these issues, is reproduced in Appendix M.

[7] "Brief for Respondents," p. 6.

The district court announced in advance that it would sustain all objections to the entire class of evidence about which Carver claimed was privileged. The court ruled, "And they [the objections] will all be sustained.... And I'm going to rule now, too. I'm not going to wait. I'm not reserving it." (Appendix L-3) Not only did Sedco do everything it could do to make a proffer, no proffer was required under the circumstances.[8]

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[8] (1) At Carver's instance, Sedco was denied discovery needed to make a more specific proffer; and

(2) Before Sedco attempted to cross-examine Carver at trial, the pretrial record had already made it quite clear what proof, and upon what theory Sedco claimed the evidence to be admissible; and

(3) The thrust of each inquiry was easily "apparent from the context within which the questions were asked" [The quotation is the operative language of Fed.R.Evid. 103(a)(2)]; and

(4) The questions were being asked of a hostile and adverse witness — the opposing party himself; and

(5) The ruling — sustaining a claim of privilege — made it impossible for the offering party to have access to the information to state a formal proffer.

Each one of these five categories is an independent reason for not denying appellate review. And all five — not just one — exist in this case.

The language of Fed.R.Evid. 103(a)(2) itself supplies the rule. Charter v. Chleborad, 551 F.2d 246 (8th Cir. 1977), applying Rule 103(a)(2), held that the test, in the absence of a proffer, is whether the trial court "was aware of the general nature of the evidence to be offered." 551 F.2d at 249 [Syl. 3]. The context here includes express reference to the pretrial discovery dispute about this very issue. (Appendix L-1) Immediately after this reference, the questioning began. Immediately, following the first in the series of questions, the court announced that Carver's objections to such questions "will all be sustained." (Appendix L-3)

There is absolutely no doubt that the district court "was aware of the general nature of the evidence to be offered." Charter v. Chleborad, 551 F.2d at 249. The district court's understanding of the matter was so complete that he unfortunately became caught up in an atmosphere of adversary gamesmanship in finding new ways to exclude the evidence. The district court, *sua sponte*, formulated his own objection to the *form* of a question — despite the fact Carver asserted no objections as to the

8 (cont'd)
form of the questions. To attempt to remedy the situation, Sedco immediately, and very respectfully, amended its questions to meet the objection as to form. But the court quickly rejected Sedco's effort, stating: "And the same ruling will be made, and even with more emphasis."

Certainly there can be no claim that the court was not aware of the general nature of the evidence to be offered.

The decision in this case conflicts with the treatment of Rule 103(a)(2) in other circuits. See e.g. United States v. Nevitt, 563 F.2d 406 (9th Cir. 1977) ("The Government contends that, under Rule 103(a)(2)...Nevitt cannot complain of any error in the exclusion of Snider's felony conviction because he made no offer of proof. None was necessary. The court was fully aware of the substance of the excluded evidence and no violation of the rule thus appears.") Murphy v. Magnolia Electric Power Ass'n, 639 F.2d 232 (5th Cir. 1981) (No offer of proof required where the subject matter of the excluded testimony (expert witness) was apparent from the context when appellants sought to introduce their expert as a rebuttal witness.)

Having been denied, upon a claim of privilege, access to the very evidence needed to make a formal proffer, it was a practical impossibility for Sedco to make one. The law, of course, does not make a requirement of such an impossibility. The applicable rule *eliminates* the need for a proffer when the trial court sustains a claim of privilege: "Another instance where no offer would be required is where the judge sustains a ruling of privilege." 21 Wright & Graham, Federal Practice and Procedure: Evidence § 5040 at 222 (1977).

(1) 1 Weinstein's Evidence ¶ 103 [03] at 103-28; 103-29 (1982): "If the judge refuses to entertain the legal theory, however, counsel may be held to be excused from making an offer of proof .... Such an offer need not be made where it would be futile and would only result in an unseemly argument with the court ...."

(2) 1 Wigmore § 17 at 318 (1940): "But a specific offer of evidence is not needed where an entire class of evidence has been in advance formally declared inadmissible by the trial court during preliminary argument or colloquy; for the court's ruling relates forward to all possible offers of such evidence and renders them needless."

(3) 21 Wright & Graham, Federal Practice and Procedure: Evidence, § 5040 (1977) at 222: "It has been held that no offer of proof need be made where the action of the trial judge would make such an offer futile."

(4) United States v. Alden, 476 F.2d 378 (7th Cir. 1973) ("While there was no offer of proof made, it is fair to say that the district court evidenced no interest in what the content of the answers might be. Compliance with the technical rules of evidence does not necessitate exercises in futility.")

8 (cont'd)

(5) Greatreaks v. United States, 211 F.2d 674 (9th Cir. 1954) ("We think, however, that when the court announced in advance that it would not receive evidence of any quarrel or hostility occurring three years prior to the date of trial, the appellant was thereby relieved of the necessity of making any further offer of proof.")

(6) Beneficial Fire and Casualty Ins. Co. v. Kurt Hitke & Co., 297 P.2d 428 (Cal. 1956) (In Bank) ("Where an entire class of evidence has been declared inadmissible or the trial court has clearly intimated it will receive no evidence of a particular class or upon a particular issue, an offer of proof is not a prerequisite to raising the question on appeal, and an offer, if made, may be broad and general.") [A California case has been cited because the Advisory Committee's Note to Fed.R.Evid. 103(a) cites California Evidence Code §§ 353 and 354 as containing similar provisions to subsequently adopted Federal Rule 103(a)].

Carver, an adverse party, held the key to the information to make a proffer. He had successfully resisted discovery of these facts. He then objected upon adverse examination while on the witness stand. No proffer was required under these circumstances:

(1) 1 Weinstein's Evidence ¶ 103[03] at 103-29 (1982): "Sometimes a proffer is not practically possible because the attorney is not aware of what the witness will say, as when a question on cross-examination is held improper or when an adverse witness is being examined on direct."

(2) Note, Excluded Evidence on Cross-Examination Preservation for Appeal, 33 N.C. L.Rev. 764 (1955) ("The majority of the jurisdictions in the United States have held that the general rule applies only to direct examination of a friendly witness, allowing an exception in cases of cross-examination or examination of a hostile witness....")

(3) McCormick, Evidence § 51 at 110 (Cleary ed. 1976) ("It is also important to note that upon cross-examination the requirement [of a proffer] is relaxed.")

(4) 88 C.J.S. Trial § 74(1955): "In a civil case it is ordinarily unnecessary for the cross-examiner to state what he expects to prove by the witness, and the exclusion of evidence may be complained of as error without an offer of proof ... To enforce the rule, requiring an offer of proof on direct examination, would only defeat the very end of cross-examination."

(5) United States v. Callahan, 551 F.2d 733 (6th Cir. 1977) ("In view of the fact that appellant's counsel was seeking facts peculiarly within the knowledge of the witness he was cross-examining, and in view of the fact that inquiry into this area was cut off at the threshold, we believe that counsel's failure to more adequately apprise the trial court of the testimony he hoped to elicit from Kimble was not fatal to this appeal.")

Nevertheless, Sedco attempted to go much further to make a proffer. For forty-one pages in the ensuing record, Sedco repeatedly attempted — and was repeatedly blocked in attempting — to cross-examine Carver about the critical, but suppressed, advice from his lawyers.[9]

3.a. Respondents incorrectly assert:

> "Sedco does not assert that the rulings on attorney-client privilege were not in accord with state law."[10]

b. Response:

(1) The ruling was clearly contrary to state law, and (2) it had the effect depriving Sedco of its right to cross-examine the opposing party upon the central issue in the case.

Iowa clearly recognizes the waiver of a privilege when a party, for his own advantage, places a matter in issue. *State of Iowa v. Cole*, 295 N.W.2d 29, 35 (Iowa 1980) (insanity plea waives physician-patient privilege by putting mental condition in issue). This decision applies Iowa Code § 622.10 (1979), which is a single statute treating both the physician-patient and the attorney-client privileges with the same identical provision. (Appendix N)

4.a. Respondents incorrectly assert:

> "Only evidence as to technical information received would go to the question of reasonable reliance."[11]

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[9] Because of its length, this portion of the record (Tr. 4273-4314) is not included in the Appendix. However, if requested by the Court, Sedco will, of course, promptly reproduce this portion of the record by filing a supplemental appendix.

[10] "Brief for Respondents," p. 6.

[11] "Brief for Respondents," p. 6.

b. Response:

Carver's decisions to (1) invest in the venture and his ensuing decisions by which he (2) breached his obligation to produce the oil and (3) lost the oil concession through forfeiture were business decisions — not mere "technical" decisions. These business decisions were all made with the advice of Carver's lawyers. The advice upon which Carver actually acted has never come to light. Respondents fail entirely to deal with the fact that such advice may serve "as the superseding cause which breaks the damage causation chain running to the defendants." *Sunstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1051 (7th Cir.), *cert. denied sub nom. Meers v. Sunstrand Corp.*, 434 U.S. 875 (1977)

II. Bribery

The holding below was that Carver did make and should have known the impropriety of his $1,500,000 bribe. (Appendix B-58) A serious federal policy question is squarely presented: whether our federal court system will knowingly allow itself to be used by a litigant to recoup losses directly incurred to exploit a business enterprise acquired through bribery of a foreign governmental official.

a. Carver attempts only two justifications for condoning his act:

(1) Sedco itself had paid agency fees to Kassem Jaidah.[12]

(2) Carver attempts to characterize the money directly advanced to profit from the illegally obtained enterprise as "collateral" to his wrongdoing.[13]

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[12]"Brief for Respondents," p. 7.

[13]"Brief for Respondents," p. 8.

b. Response:

(1) It is undisputed that Sedco's payment of agency fees to Kassem Jaidah, in vital distinction from Carver's bribe, was entirely proper. It is undisputed that it was the Qatar government which required Sedco to maintain a resident sponsor. (Appendix B-30 n.15)

(2) Carver's direct advancement of money to attempt to profit from the illegally obtained enterprise is not truly "collateral" to his wrongdoing. The advances were necessarily required to realize any profit from the wrongdoing. Even in contexts less serious than inducing governmental corruption on an international scale, the seriousness of the offense overcomes the wrongdoer's rejoinder that his claim is "collateral" to his offense. *Nathan v. Tenna Corp.*, 560 F.2d 761, 764-65 (7th Cir. 1977).

CONCLUSION

For the foregoing reasons and for the reasons stated in Sedco's petition, a writ of certiorari should issue to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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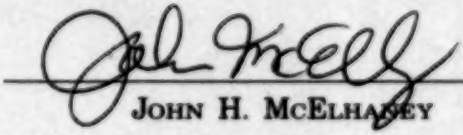
CERTIFICATE OF SERVICE

I certify that true and correct copies of this document have been mailed by certified mail, return receipt requested, to Mr. David M. Elderkin, of Elderkin, Pirnie, VonLackum & Elderkin, 619 Higley Building, P. O. Box 1968, Cedar Rapids, Iowa 52406, and to Mr. D. G. Ribble, of Lynch, Dallas, Smith & Harman, 526 Second Avenue, S.E., P. O. Box 2457, Cedar Rapids, Iowa 52406 this 11th day of November, 1982.



JOHN H. MCELHANEY

APPENDIX H

APPENDIX H

Excerpts from Deposition of Roy J. Carver, July 9, 1980

Q: Okay. Now we are talking about lawyers. Were there any lawyers that you consulted with before you got in the concession?

A: No.

Q: As a matter of fact, did you consult with Mr. David Elderkin?

A: Yes.

Q: Did you furnish Mr. Elderkin with information about the proposal to get into it?

MR. ELDERKIN: Anything to do with any conversation with Elderkin is objected to as invading the attorney-client privilege, and I instruct him not to answer.

Q: Without regard to what information you disclosed to Mr. Elderkin, I want you to answer it, this limited question, and that is, did you rely to any extent upon information or opinion supplied to you by Mr. Elderkin or his office in formulating your decision as to whether or not to enter into the concession?

MR. ELDERKIN: I make the same objection and the same admonition not to answer the question.

Q: Without telling me whether you relied on it or not, will you tell me whether or not Mr. Elderkin in any way responded to your request for consultation on the matter before you entered into the concession agreement?

MR. ELDERKIN: Same objection and same admonition.

Q: Were you planning on a lawsuit at the time you sought Mr. Elderkin's advice before you entered into the concession?

MR. ELDERKIN: You can answer that.

A: No.

Q: So none of the work that Mr. Elderkin did for you at the time you were deciding to get into the concession or enter into the drilling contract with SEDCO or the guarantee with SEDCO was trial preparation work, was it?

A: No, none of it.

MR. McELHANEY: All right. Mr. Elderkin, we will file appropriate motions on that.

MR. ELDERKIN: I understand. You go right ahead.

APPENDIX I

APPENDIX I

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF IOWA
Davenport Division

SEDCO INTERNATIONAL, S.A., *Plaintiff,* vs. ROY J. CARVER, *Defendant and Counterclaim Plaintiff,* vs. SEDCO INTERNATIONAL, S.A., SEDCO, INC., and SEDCO ENERGY CORPORATION (Formerly TerraMar Consultants, Inc.), *Counterclaim Defendants.*	**Plaintiff and Counterclaim Defendants Motion and Brief Upon Carver's Claim of Attorney-Client Privilege**

PLAINTIFF AND COUNTERCLAIM DEFENDANTS' MOTION AND BRIEF UPON CARVER'S CLAIM OF ATTORNEY-CLIENT PRIVILEGE

Plaintiff Sedco International, S. A., and counterclaim defendants Sedco International, S. A., Sedco Incorporated and Sedco Energy Corporation file this motion and brief to compel discovery under FED.R.CIV.P. 37(a) of the information possessed by and available to Roy J. Carver relevant to the issue of his claimed reliance upon representations allegedly made by the Counterclaim Defendants:

I. Basis of Motion.

This case presents the unusual spectacle of Roy J. Carver suing the Counterclaim Defendants for large damages allegedly resulting from Carver's claimed reliance upon alleged misrepresentations by the Counterclaim Defendants, said to have been what induced Carver to loose money on an oil production venture; Carver admitting that he sought and obtained the advice of two sets of attorneys before getting into and during the course of the venture;[1] Carver admitting that consultation with the attorneys was not in anticipation of litigation and was not trial preparation work (Carver July 9, 1980 deposition, pp. 253-254); but Carver nevertheless is attempting to envoke the attorney-client privilege to prevent discovery of the facts which bear directly upon the issue of his alleged reliance upon the Counterclaim Defendants.

The information available to Carver is, of course, directly relevant to his claimed reliance upon the Counterclaim Defendants. *Lockard v. Carson*, 287 N.W.2d 871 (Ia. 1980); *Bell v. Henson*, 74 S.W.2d 455 (Tex.Civ.App. — Waco 1934, writ dism'd.).

II. Attorney-Client Privilege.

Movants recognize that, as a general rule, confidential communications, communicated in the course of professional employment between an attorney and his client are privileged, however, the client cannot avail himself of the privilege to shield himself from a disclosure of facts which are a legitimate subject of inquiry. 97 C.J.S. *Witnesses* § 276, p. 782 (1957). Because the attorney-client privilege is "an obstacle to the investigation of the truth"

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[1] The two sets of attorneys are Mr. Brown of Chapman and Cutler in Chicago (Carver July 9, 1980 deposition, p. 320), and Mr. David Elderkin of Cedar Rapids, Iowa (Carver March 25, 1980 deposition, pp. 57-58; July 9, 1980 deposition, pp. 252, 318-320).

it should be "strictly confined within the narrowest possible limits consistent with the logic of the principle." *Jax v. Jax*, 243 N.W.2d 831, 836 (Wis. 1976).

Carver, the party seeking to establish the privilege, has the burden of proving both the existence of the attorney-client relationship and that the communications in question were made in confidence. *Bailey v. Chicago, Burlington & Quincy Railroad Co.*, 179 N.W.2d 560, 564 (Ia. 1970). The attorney-client privilege is lost if the communicated information is made public or transmitted to third persons in any manner. *Id.* 563-64.

A mere showing that the communication was from a client to his attorney is insufficient to warrant a judging that the communication is privileged. *Jax v. Jax, supra*, 243 N.W.2d at 836. In *Matter of Fischel*, 557 F.2d 209, 211 (9th Cir. 1977) the Ninth Circuit, citing Wigmore, held:

> "The purpose of the privilege is to protect and foster the client's freedom of expression. *It is not to permit an attorney to conduct his clients' business affairs in secret.*" (Emphasis added)

The privilege does not extend beyond the substance of the client's confidential communications to the attorney; "it will not conceal everything said and done in connection with an attorney's legal representation of a client in a matter." *Id.* at 211-12.

> "An attorney's involvement in, or recommendation of, a transaction does not place the cloak of secrecy around all incidents of such a transaction."

Id. at 212.

Carver should be compelled to produce documents and answer questions concerning what his attorneys have communicated to him. It has been held that the attorney-client privilege provides less support for attorney to client

communications, and that information transmitted to him by his attorney which has a direct bearing on the issues in the suit are entitled to *much less favored treatment*. 97 C.J.S. *Witnesses* § 276 (a), page 785 (1957). In *Magida v. Continental Can Co.*, 12 FRD 74 (S.D.N.Y. 1951), the plaintiff brought a shareholder's derivative action on behalf of Vulcan Co., to recover profits realized on a short swing transaction in Vulcan stock by the defendant. During the course of discovery, the defendant sent interrogatories to the plaintiff (and to plaintiff's lawyers) requesting, among other things, facts which would bring out plaintiff's knowledge of facts and circumstances surrounding the defendant's sale of Vulcan stock. *Id.* at 75. Information about matters in dispute which has been gathered exclusively by the attorney and then communicated to the client, are without privilege. *Id.*

> "The plaintiff may not be excused for furnishing required information on the theory that the facts are known only to his attorneys and that such information in their position is privileged ... the abuse inherent in an overextension of privileged information given the client by his attorney is apparent. The attorney could elicit the information from third parties, subject to discovery, then communicate it to his client as 'advice' and thereby render it privileged. *This is a subversion of the whole modern trend towards appropriate pre-trial discovery.*" (Emphasis added.)

Id. 76-77. It is well established that the attorney-client privilege does not extend to information which the attorney secures from collateral sources and then communicates to the client. *Hickman v. Taylor*, 329 U.S. 495, 508 (1947); *Magida, supra; Giordani v. Hoffman*, 278 F.Supp. 886, 889 (E.D.Pa. 1968); *Matter of Fischel, supra.*

Therefore, any communications from Carver's attorneys in the nature of business advice or factual information

gathered from independent sources, is discoverable and not protected by the attorney-client privilege. Furthermore, in that one of the pivotal issues in this cause is Carver's claimed justifiable reliance on alleged fraudulent inducements, his attorney's opinions concerning the Qatar drilling project are crucial to establish Carver's state of knowledge and awareness of the risks involved in the venture. The movants respectfully request the court to compel Carver to produce all documents and to answer deposition questions concerning communicatons to and from his attorneys pertaining to (a) business advice, (b) facts and (c) opinions concerning business and legal risks.

III. Work Product.

Although it is settled that information obtained by a lawyer in collecting information to prepare for litigation pending against the lawyer's client is not privileged under the attorney-client privilege, it may be protected under FED.R.CIV.P. 26(b)(3), the "work product" rule. *The City of Philadelphia v. Westinghouse Electric Corp.*, 210 F.Supp. 483, 485 (E.D.Pa. 1962). In *Matter of Fischel, supra*, the appellant also sought to exclude certain summaries of business transaction stating that they were prepared by his attorney as work product. The court rejected this argument in a summary fashion:

> "The limited work product immunity extends only to certain materials prepared by an attorney in anticipation of litigation. The summaries were not prepared in such a setting."

Id. at 212-13. Movants respectfully direct the Court's attention to pages 253-254 of Carver's July 9, 1980 deposition. Therein Carver is asked if the non-disclosed communications involve trial preparation materials and his response is negative.

The movants are simply seeking to get at the truth. How much did Roy Carver know about the inherently risky drilling project he was getting into in 1975? What facts did Carver's attorneys discover and communicate to him concerning the deal? The vital questions will never be answered unless the Court compels Carver to respond to discovery upon these matters.

IV. Waiver.

It is important to remember that it is Carver himself who has chosen to place his alleged reliance upon the Counterclaim Defendants in issue. It is particularly unfair and inappropriate for him to attempt to use a claim of attorney-client privilege as a sword rather than a shield. Our facts are strikingly analogous to the controlling principle applied in *Jack Winter, Inc. v. Koratron Co.*, 50 F.R.D. 225 (N.D. Cal. 1970) [Syl. 8] where a claim of duress, which we submit is analogous to a claim of fraud, was held to place the facts regarding reliance upon counsel in issue. The court held:

> "Such a claim necessarily raises the issues of whether any advice was given as to the agreement, what the content of that advice was, the competence of the advice, and whether such advice was in fact relied upon by Koratron when it entered into the agreement. We thus have a similar situation to that in which a plaintiff waives the doctor-patient privilege by placing the state of his health into issue. *See Wigmore,* Evidence 2389. We have heretofore directed Dan River to first pursue the client in this instance also. However, we agree with Dan River that Koratron has waived any privilege as to communications between White and officers of Koratron involving the Dan River Agreement."

Even a privileged communication between a criminal defendant and his trial counsel is waived if the client claims that he did not have proper information upon which to rely. In *Johnson v. U.S.*, 542 F.2d 941 (5th Cir. 1976), the court held that any attorney-client privilege was waived by a criminal defendant who claimed that a prior guilty plea was not knowledgeably and intelligently made. The advice from trial counsel thereby became admissible evidence. *Cf. U.S. v. Woodall*, 438 F.2d 1317, *cert. denied*, 403 U.S. 933, 91 S.Ct. 2262.

V. Conclusion.

Movants respectfully request the Court to grant this motion to compel under FED.R.CIV.P. 37(a). Discovery of Carver's communications with lawyers regarding the reliance issues does not violate the attorney-client privilege or the work product rule. The Court cannot adequately resolve the merits of this case unless the circumstances of the information pertaining to Carver's claim of reliance are fully disclosed. Carver should be required to disclose the communications to and from his attorneys regarding the information which he actually had at the time of his claimed reliances.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been hand delivered to all counsel of record for Roy J. Carver, this 25th day of July, 1980.

/s/
JOHN H. MCELHANEY

APPENDIX J

APPENDIX J

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF IOWA
Davenport Division

SEDCO INTERNATIONAL, S.A.,
Plaintiff,

vs.

ROY J. CARVER,
Counterclaim Plaintiff,

vs.

SEDCO INTERNATIONAL, S.A.,
SEDCO, INC., and
SEDCO ENERGY CORPORATION
(Formerly TerraMar
Consultants, Inc.),
Counterclaim Defendants.

Civil No. 77-85-D

Resistance to Counterclaim Defendants' Motion to Invade Carver's Attorney-Client Privilege

1. Basis of Motion. This Motion admits the general rule that confidential communications between an attorney and his client are privileged.

The privilege is of ancient origin, premised on a recognition of the inherent right of every person to consult with legal counsel and secure the benefit of his advice free from any fear of disclosure even, it must be said, to Sedco.

Section 622.10 Code of Iowa, 1979.

97 CJS Witnesses, Par. 276, p. 782.

Bailey vs. Chicago, Burlington and Quincy Railroad Company (Iowa 1970), 179 N.W.2d 560; 58 Am.Jur., Witnesses, § 483, p. 270.

Sedco seeks to avoid this rule by the argument that if Carver's attorneys had any opinions concerning the Qatar drilling operation, they are crucial to establish Carver's state of knowledge and awareness of the risks involved in the venture. Sedco demands therefore that Carver produce all documents and answer questions concerning communications to and from his attorneys pertaining to business or legal advice.

Sedco does this by urging two Iowa cases as basic authorities for their demand. We agree that Iowa authorities on the proposition are controlling and further agree that the authorities cited by Sedco are most persuasive.

These authorities, in the order in which they are cited in Sedco's Motion are *Lockard vs. Carson*, 287 N.W.2d 871 (Iowa 1980) and *Bailey vs. Chicago, Burlington and Quincy Railroad Company*, 179 N.W.2d 560 (Iowa 1970).

The Lockard case doesn't say anything about attorney-client relationship, but it says a great deal about fraud and fraudulent misrepresentations. It lays down the following rules:

(a) Fraud may arise not only from misrepresentation but from concealment as well.

(b) As between the parties to a contract obtained by fraud and deceit, the party making a misrepresentation for the purposes of inducing another to act will not be heard to say that his false statement ought not to have been believed.

(c) Caveat emptor is no longer the pole star for a business.

(d) A vendor cannot shield himself from liability by asking the law to condemn the credulity of the purchaser.

Carver's allegations in this case and the evidence disclosed by the depositions show a factual situation in which Amos L. Carter, vice president of drilling operations for Sedco, Inc., and Robert L. Smith, president of TerraMar Consultants, a division of Sedco, Inc., represented to Roy Carver that they had peculiar and specialized knowledge of the proposed concession, the wells, the geology, the economics, and the government connections in Qatar through which dealings could be made.

Acting either individually or in concert, together with other employees of Sedco such as Billy Joe Peterson and Carl Thorne, these men portrayed to Roy Carver a situation in which they claimed to know from their specialized and peculiar knowledge that re-opening these wells, which had originally been drilled by Sedco, would yield tremendous profits on the basis of a $2 to $2.5 million capital investment; that oil would be produced by the simple expedient of turning on a spigot, emptied into a barge and sold; that this would be done by April 1, 1976; and that under a concession agreement they could help obtain from the Qatar government a cost recovery provision which would permit Mr. Carver to get his money back immediately and then be able to drill additional wells in this allegedly most valuable area.

These men concealed from Mr. Carver the fact that the wells were marginal reservoirs, abandoned by the Japanese because they were not economically viable, passed up by major oil companies, and, most important, were loaded with H2s, hydrogen sulphide, a deadly poison to

human beings and a highly corrosive agent to tools, machinery and equipment.

At the time these representations were made to Mr. Carver, it is uncontroverted — completely uncontroverted — that the information concerning the infirmities of these wells as to the volatility of the oil, the small and marginal reservoirs, and the huge percentage of H2s was in the files of Sedco, Inc.

It is also uncontroverted in the record that this information was not disclosed to Mr. Carver, and it is uncontroverted in the record that the re-entry program financed by Mr. Carver, instead of getting oil on stream and sold by April 1st, as represented, took a period of six months at an average cost of $35 to $40,000 per day, at the end of which time the wells, specifically A-2, had not been successfully entered.

It is also uncontradicted in the record that during the re-entry procedure, Earl and Wright, a Sedco subsidiary, advised Mr. Carver that instead of getting into production by April 1st on a capital investment of $2 to $2.5 million, he was faced with the proposition of spending an additional $24 million to get into production on the three wells, which amount would largely have to be expended before the production period of one year away.

It is also uncontroverted in the record that the beneficiaries of these false and fraudulent representations were:

(a) Sedco, Inc., whose Gusto Rig 75 had been unemployed for a long enough period that it was the subject of a comment by Mr. Cunningham, president of Sedco, Inc.'s drilling division (Exhibit 207, page 10);

(b) At the time the misrepresentations were made, TerraMar Consultants, Sedco's division, was in a deficit position. During all of the years of TerraMar's existence,

the only year in which it showed a profit was the year that it was being paid by Roy J. Carver;

(c) Amos L. Carter's brother, Bernie, was employed by Holcar and paid by Carver as manager of Holcar for the sum of $9,000 per month; Earl and Wright, a subsidiary of Sedco, was employed and paid;

(d) $1,500,000 was paid to Ali Jaidah and/or Kassem Jaidah. It was Amos Carter who suggested the payment; it was Amos Carter who called Mr. Carver and told him that if the payment were not made, the deal would not go through.

The payment was made into a Swiss bank account in the name of Kassem Jaidah, at the direction of Ali Jaidah. Kassem Jaidah is and has been for many years an agent of Sedco. Sedco, Inc., in 1976 and 1977, paid into the same Swiss bank account in the name of Kassem Jaidah in excess of $1,300,000.

Within eight days after Mr. Carver had paid the money into the Swiss bank account of Kassem Jaidah, Kassem Jaidah paid to Amos L. Carter the sum of $300,000, which amount was deposited by Amos L. Carter in his own Swiss bank account.

In a deposition taken April 24, 1980, Amos Carter, represented by counsel for Sedco, Inc., stated that he was in partnership in a ranching operation in Texas with a Gulf N V Corporation, an Antilles corporation. He stated he didn't know who owned the corporation (Carter, second deposition, page 178, line 2, et seq).

Carter, at the same time, upon consultation with his attorneys from Sedco, denied ever receiving any money from Ali Jaidah, Kassem Jaidah, or Jaidah Motors (Carter, second deposition, page 194, line 20 page 195, line 19).

The foregoing was false testimony. Kassem Jaidah and Amos L. Carter became partners back in January of 1975 (Carter, third deposition taken July 11, 1980, page 32, lines 4 and 5).

Gulf N V Corporation, a partner of Amos L. Carter in his ranching operation, is owned by Kassem Jaidah and a banker from Doha (Carter, third deposition, page 33, lines 12 to 16).

On January 14, 1976, Kassem Jaidah paid Amos L. Carter $300,000 which went into Amos L. Carter's account in the Swiss Credit Bank of Geneva (see Exhibit 316 and Amos L. Carter, third deposition, page 18, lines 7 to 9).

Kassem Jaidah likewise is a great and good friend of Sedco, Inc. as a corporation, the friendship going back at least to 1970 when Kassem Jaidah helped Sedco get the drilling contract for the Japanese (Exhibit 2).

2. The elaborate entertainment by Sedco officers, including B. Gill Clements, president and chief executive officer of Sedco, Inc., in July of 1978. B. Gill Clements took them all to the rodeo (Exhibit 264, second page; Exhibit 265).

As Mr. Clements stated:

Q. You don't mean at this time, as president and chief executive officer of Sedco, to repudiate anything Amos did, do you, or do you?

A. I think the answer to that question is no (B. Gill Clements, second deposition, page 29, lines 15 to 24).

At the time Mr. Carver was presented with the first representations from TerraMar Consultants (Exhibit 8), TerraMar was represented by Sedco, Inc., in part as

follows:

"TerraMar was organized in response to the petroleum and mineral industry's continually growing need for sound objective analysis and advice. Specialists in counseling on oil and gas exploration and development, this firm's key personnel (Smith, Schroeder and Porter) apply to its clients' problems an expertise based on broad international experience.

"These petroleum oriented professionals (Smith, Schroeder and Porter) possess a depth of technical knowledge acquired in productive consultant work in all parts of the world. * Many major petroleum companies, independent oil operators, government agencies, and officially sponsored organizations interested in natural resource development have benefited from these endeavors. The same talent, experience and integrity which these professional problem solvers brought to their previous assignments now is available to TerraMar, in the disciplines in which these men have proved themselves: (a) engineering, (b) geology, (c) management" (Exhibit 213).

Thereafter, TerraMar, on August 25, 1975, represented that a capital expenditure of $2 million should be adequate to re-enter and complete wells A-1 and A-2 to install flow lines and to purchase and install a tanker to provide storage for produced oil; and that the venture was extremely attractive financially, would make perhaps over 900 percent profit in less than half a year on a $2 million investment.

After examining further data, on November 14, 1975, TerraMar Consultants, through Robert L. Smith, stated that his examination of further data only tended to support the attractiveness of the venture (Exhibits 8, 83, 54; Smith, first deposition, page 205, line 6 to page 206, line

10 and page 257, line 22 to page 258, line 1).

Since June of 1980, the defense in this case has changed. Answers to Interrogatories made by Sedco, Inc. and filed July 25, 1980, by John H. McElhaney, one of Sedco's present counsel, revealed the following:

Interrogatory No. 5. Assume without admitting that on July 25, 1975, Amos L. Carter told Carver that it would only cost him about $2 million to $2.5 million to reenter these wells, get them into production, and get oil on stream; and that giving the government 70 percent and keeping 30 percent would net about $500,000 a month after expenses.

Was Carver reasonably entitled to rely upon this representation and if not, why not?

Answer: No, because Amos was not an expert on such matters and was not qualified to make any such statement or representation which would have been merely an opinion or prediction based on speculation as to what might happen in the future. Further, it is reckless and imprudent and a risk obvious to Carver for anyone to embark upon major oil production operations, such as attempted by Holcar, without assembling an existing competent staff with experience and expertise in all facets of the venture and devoting through advance study, planning and evaluation to the project, including on site inspection, before embarking on it.

Interrogatory No. 5(f). Assume without admitting that TerraMar Consultants made a written report in which it represented that it had completed engineering studies of all of the fields in Qatar; had reviewed onshore and offshore exploratory prospects of Qatar for other clients, and had made a thorough review of the exploratory prospects of the Japanese QOC concession; that in the report Ter-

Mar represented that by reason of this background, its conclusions were valid and represented a reasonable basis for negotiations with the Qatar government; that TerraMar stated a capital expenditure of $2 million should be adequate to re-enter and complete wells A-1 and A-2, to install flow lines and to purchase and install a tanker to provide storage for produced oil and that the venture was extremely attractive financially (see Exhibit 8).

If these representations were made by TerraMar, was Carver reasonably entitled to rely thereon and if not, why not?

Answer: The same as above. Additionally, such representations would constitute mere opinions. TerraMar was not an expert on development procedures or costs.

Sedco now seeks to invade the attorney-client privilege by seeking to determine what any attorney for Carver advised him. The basis apparently is the question addressed to Mr. Carver in his first deposition by Sedco's attorneys as to whether or not he ever talked to anyone at all who was negative about the project, to which Mr. Carver responded: "Yes, Mr. Elderkin." (Carver, first deposition, page 57, lines 13 to 19).

The assumption is that if Mr. Elderkin was negative about the proposition, that therefore Mr. Carver should not have believed the representations by Amos L. Carter and Robert L. Smith and others connected with Sedco, Inc., and not have relied upon them. How Elderkin or any other attorney for Carver would have any knowledge of the factual situation as represented by Sedco, to-wit: the condition of the wells, the reserves, the costs of development, the amount the wells had produced, the composition of the effluent, and all of the other specialized matters, is not shown. To believe that Elderkin or any other counsel had any knowledge of well drilling or well re-

entry in offshore Qatar in 1976, or knew anything about oil reserves, the history of these particular wells, or concession agreements, is obviously unsound. To imply that Elderkin or any other counsel could advise or did advise Carver on the fact that there was really such a percentage of H2s in the oil that the economic representations of Sedco should not be believed is an obvious absurdity.

That any counsel for Mr. Carver, including Elderkin, ever purported to give Mr. Carver advice on well drilling, well re-entry, the condition of these wells, the composition of the oil, and the cost is obviously not true.

It would seem plain, therefore, that in addition to the atttorney-client privilege, any negative thoughts expressed by Mr. Elderkin on this matter, whatever they were and in whatever context they arose, would not be relevant or material to the ultimate substantive issue.

> "Caveat emptor is no longer the pole star for business." Syester, 133 N.W.2d 668.
>
> "*The party making a misrepresentation for the purpose of inducing another to act will not be heard to say that his false statement ought not to have been believed."

The thrust of Sedco's contention that they can invade the attorney-client relationship is based upon their proposed question: "How much did Roy Carver know about the inherently risky drilling project he was getting into in 1975? What facts did Carver's attorneys discover and communicate to him concerning the deal?" (Last paragraph, page 5, Counterclaim Defendants' Motion).

There isn't any record, and it is not factual, that Carver's attorneys discovered and communicated to him any facts concerning the "inherently risky drilling project" he was getting into in 1975.

He testified that he relied upon Sedco, Inc., through its vice president for drilling operations, Amos L. Carter; its rig manager, Billy Joe Peterson, and TerraMar Consultants to advise him about the project and the "risks."

It was Sedco that drilled the wells and TerraMar Consultants that studied them. Amos L. Carter was telling him "There is no way in hell you can lose on this deal" and TerraMar Consultants through Robert L. Smith was stating:

> "It appears that an investor can recoup a reasonable capital outlay out of as little as 15 percent of the oil. * The re-entry of the QOC wells and production therefrom is an attractive oil field investment. Considerable additional study is warranted but the risk of complete failure is very low in view of the fact that test data have demonstrated production capability of approximately 4,000 barrels per day from only one well." (Exhibit 8).

Following a trip to Doha at Carver's expense to examine the data he referred to, Smith was then stating that his examination of the files in the Department of Petroleum Affairs was "only to provide additional encouragement to the re-entry program suggested" (first paragraph, second page, Exhibit 56); and in his second report for transmittal to Mr. Carver, he was advising that:

> "It is certainly obvious that this is a very attractive venture. I believe examination of these data by personnel with the Ministry in Qatar would be detrimental to your case." (Exhibit 54).

The thought that Sedco can invade the attorney-client privilege of Mr. Carver by the assertion that Mr. Carver was relying upon an attorney from Cedar Rapids, Iowa, to advise him concerning re-entering wells in the Persian Gulf, rather than relying upon the well-advertised exper-

tise of Sedco, Inc. and TerraMar Consultants is hardly well taken.

As to the Iowa rule on attorney-client privilege, Counterclaim Plaintiff agrees that the case cited by Sedco, Inc., to-wit: *Bailey vs. Chicago, Burlington and Quincy Railroad Company,* 179 N.W.2d 560, is persuasive. It does not, however, read as indicated by Sedco.

It was a case in which Ward Reynoldson, who, of course, is now chief justice of the Iowa Supreme Court, was permitted to testify as to communications between himself and a prior client, then deceased.

The Iowa Supreme Court reversed, stating that there was no waiver, no reference to any presence of third parties, nor was the attorney acting as a scrivener.

In upholding the privilege, the Court made the comment that:

> "'Every client must be accorded benefit of the statutory privilege, once established as in this case, unless there is some realistic basis upon which to find absence of confidentiality or a knowing and voluntary waiver. Any other approach would serve to materially erode the privilege and unduly restrict that free and open rapport between counsel and client so essential to the proper administration of justice."

/s/

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/s/

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ATTORNEYS FOR COUNTERCLAIM
PLAINTIFF ROY J. CARVER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties to the above entitled cause by enclosing the same in an envelope addressed to each such attorney at his respective addresses disclosed by the pleadings of record herein, with postage fully paid, and by depositing said envelope in a United States Post Office depository in Cedar Rapids, Iowa on the 31st day of July, 1980.

/s/

D. M. ELDERKIN of
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Copies to: Ralph D. Sauer and John H. McElhaney

APPENDIX K

APPENDIX K

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF IOWA
Davenport Division

SEDCO INTERNATIONAL, S.A., *Plaintiff,* vs. ROY J. CARVER, *Defendant and Counterclaim Plaintiff,* vs. SEDCO INTERNATIONAL, S.A., SEDCO, INC., and SEDCO ENERGY CORPORATION (Formerly TerraMar Consultants, Inc.), *Counterclaim Defendants.*	**Civil No. 77-85-D** **Plaintiff and Counterclaim Defendants' Supplemental Brief in Support of Their Motion for Discovery Concerning Carver's Claim of Attorney-Client Privilege**

PLAINTIFF AND COUNTERCLAIM DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR MOTION FOR DISCOVERY CONCERNING CARVER'S CLAIM OF ATTORNEY-CLIENT PRIVILEGE

Plaintiff Sedco International, S.A., and counterclaim defendants Sedco International, S.A., Sedco, Inc. and

Sedco Energy Corporation file this supplemental brief in response to Carver's resistance to their motion for discovery under FED.R.CIV.P. 37(a) of the information possessed by and available to Roy J. Carver relevant to the issue of his claimed reliance upon representations allegedly made by the counterclaim defendants, and would show the Court as follows:

I. Carver's resistance is based upon three fatal deficiencies:

1. Circularity of reasoning.

2. A misstatement of the relevancy of Carver's knowledge and information.

3. Failure to deal with the waiver issue.

1. Circularity of Reasoning.

Carver's resistance (pages 3 through 13) is largely an evidentiary argument that he relied upon the counterclaim defendants and that inquiry, therefore, should somehow be foreclosed upon any facts which would tend to contradict this self-asserted conclusion. The difficulty with this circularity of reasoning is the assumption of the end result as the starting point in the analysis.

The self-asserted conclusion that Carver relied solely upon the counterclaim defendants is belied by the fact that as early as October 16, 1975, two and one half months before Holcar obtained the oil concession from the government of Qatar, and before entering into the drilling contract with Sedco International, Carver and Holcar

were obtaining advice about the venture from Mr. Elderkin. (See attached letter of January 12, 1976.)[1]

2. Misstatement of the legal relevancy of the information available to Carver.

The resistance incorrectly mischaracterizes our position to be that "A vendor [can] shield himself from liability by asking the law to condemn the credibility of the purchaser." (Resistance, p. 3.) This mischaracterization is a straw issue which has been set up by the resistance in order to be knocked down. It ignores the true and logical relevancy of the information which Carver seeks to supress. "[T]he test for determining whether a party to a transaction has a right to rely on representations of another is ... whether the complaining party, in view of *his own information* and intelligence, had a right to rely on the representations." *Lockard v. Carson*, 287 N.W.2d 871 at 878 [Syl. 10].

Carver's response does not cite any legal authority contrary to the movants' arguments that the attorney-client privilege does not extend to information which the attorney secures from collateral sources and then communicates to the client and that the privilege does not extend to attorney to client communications which are relevant to the client's state of mind or awareness.

3. Waiver

Although Carver does concede that the attorney-client privilege can be waived (Resistance, at p. 14), his re-

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[1] It is apparent from the January 12, 1976 letter that (a) a prior letter of October 16, 1975 gave some information and advice to Carver (Counterclaim defendants do not have the October 16, 1975 letter) and (b) through Mr. Elderkin, Carver was being placed in touch with someone who was familiar with oil drilling ventures. (January 12 letter, paragraph 4, page 3.)

sponse completely fails to address the movants' waiver arguments.[2] When Carver filed his counterclaim premised on allegations of fraudulent inducement by and reliance on the counterclaim defendants, he chose to place his state of mind and awareness into direct issue and waived any right to assert attorney-client privilege as to such issues. *Jack Winter, Inc. v. Koratron Co.*, 50 F.R.D. 225 (N.D. Cal. 1970); *Johnson v. U.S.*, 542 F.2d 941 (5th Cir. 1976).

Carver even attempts a fatally inconsistent crowning blow in his effort to supress the information obtained from Carver-Holcar attorneys. During the course of the oil venture the firm of Wadsworth, Elderkin, Pirne & Von Lackum billed Holcar over $90,000.00 for services. (Computer printout dated July 24, 1980, tendered as a trial exhibit by Carver at the pre-trial conference of July 25, 1980).[3] Carver has chosen to sue the counterclaim defendants for these charges by including them in the counterclaim. But the reasonableness and necessity of these charges, which Carver has himself placed in issue, cannot even be assessed without discovery of what they were and what they consisted of. These services also bear directly upon the issue of Carver's "own information and intelligence"[4] at the various times the services were performed.

---

[2] In addition, Carver's response makes no claim whatsoever that the "work product" rule is applicable. Based upon Carver's own testimony, the non-disclosed communications did not involve trial preparation. (Carver, July 9, 1980 deposition at 253-54).

[3] Counterclaim defendants also believe that discovery will reveal Carver's knowledge gained from other attorneys such as Mr. Ed Brown of Chapman & Cutler and Mr.Anderson of Baker & Botts of Houston, an oil and gas specialist. Baker & Botts billed approximately $14,000 and Chapman & Cutler billed approximately $54,000. Carver is suing to recover all of these fees.

[4] *Lockard v. Carson*, 287 N.W.2d 871 at 878 [Syl. 10].

II. CONCLUSION

Movants respectfully request the Court to grant this motion to compel under FED.R.CIV.P. 37(a). Carver's claim of reliance on the counterclaim defendants is of critical importance in this case. Carver should be required to disclose communications to and from his attorneys regarding the information he actually had at the time of his claimed reliances.

Respectfully submitted,

/s/

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Attorneys for Plaintiff Sedco International, S.A. and Counterclaim Defendants Sedco International, S.A., Sedco, Inc., Sedco Energy Corporation (Formerly TerraMar Consultants, Inc.)

CERTIFICATE OF SERVICE

This is to certify that the foregoing document has been mailed to all counsel of record for Roy J. Carver this 11th day of August, 1980.

/s/

JOHN H. MCELHANEY

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52406

January 12, 1976

Mr. Roy J. Carver
P. O. Box 339
Muscatine, IA 52761

ATTN: Mrs. Marcella McKillip

Dear Roy and Marcella:

I have reviewed the proposed drilling contract with Sedco, Inc., as sent to me by Amos L. Carver, Vice President Middle East Operations of Sedco.

Let me repeat and renew the observations I made in my letter of October 16, 1975.

I have the following objections and comments concerning the proposed contract:

1. The first paragraph of the Agreement is incorrect. Holcar Oil Company is a Corporation organized and existing under the laws of Cayman Islands, British West Indies with its principal office in Grand Cayman, Cayman Islands, British West Indies. (There wouldn't be much sense in organizing an off-shore corporation for tax purposes and then have the principal office in Muscatine, Iowa.)

For the same reason, paragraph IV(c) should provide that the address of Holcar Oil Company is P. O. Box 309,

Grand Cayman, Cayman Islands, British West Indies and copy to Holcar Oil Company, P. O. Box 339, Muscatine, Iowa.

2. In the event of any dispute, your legal rights are, in my judgment, unenforceable. Article XIV(f) provides that in the event of any differences that cannot be amicably settled, you agree to arbitration in Texas in accordance with the rules of the American Arbitration Association and you agree that their award shall be final and binding. Thus, you abandon your right to any judicial review of any dispute, agree to go to Texas and agree to the judgment of the American Arbitration Association, which adopts their own rules of evidence and procedure and picks their arbitrators. I suspect all of them, from Dallas.

Moreover, if by any chance the judgment would be in your favor, how would you enforce it? The contract you have is made with the group that describes itself as Sedco International SA, a Corporation organized and existing under the laws of Panama, with its registered office in Panama, at least as far as the preliminary paragraph is concerned. It signs itself, however, as Sedco International SA, P. O. Box 833, Tehran, Iran, with copy to Sedco, Inc. of Dallas, Texas. I gather that Sedco International SA, the Panama Corporation with whom you are dealing, is not one and the same as Sedco, Inc. of Dallas, Texas. I assume that Sedco International is a subsidiary of Sedco, Inc., but I don't know this. Neither do you, and it makes a great deal of difference, obviously.

3. I read the contract several times, and I cannot determine what it is that the contractor agrees to do. Does he have his choice as to whether or not to drill or to reenter and over what period of time?

Nor do I have any idea as to what equipment Holcar should furnish and what control it shall have over it in

order to be liable for its damage (XI(b)). Likewise, I do not know how to reasonably determine the effect of the areas of responsibility outlined in the subparagraphs under XI but am particularly disturbed by the indemnification agreement to be made by you in the last paragraph of XI.

4. In essence, what I am saying with respect to the caveat set out above is that I am not familiar enough with the oil and gas business to adequately appraise the substance of the agreement with respect to the subsitive elements such as equipment, performance and the like. Nor is anyone else, to my knowledge, who is acting strictly on your behalf. Consequently, I have, by telephone, urged Marcella to send this to a friend of mine who is familiar in this field.

Best regards,

/s/

D. M. ELDERKIN

DME:rac

APPENDIX L

APPENDIX L

Excerpts from Trial Transcript, October 9, 1980

Q: (By Mr. McElhaney [for Sedco]) All right, sir. Well, what I'd like to do is ask you a series of questions, and these will follow in general the same format. What I'd like for you to do is tell me what factual information you obtained initially from Mr. Elderkin back in October, 1975, with regard to Holcar or the venture which Holcar ultimately entered into.

A: I don't recall.

Q: Exhibit 609, a letter of January 12, 1976 — it's already in the record, but I'll hand you a copy for convenience — was from Mr. Elderkin to you, Attention Marcella McKillip, addressed, "Dear Roy and Marcella", and it refers to Mr. Elderkin's prior letter of October 16, 1975, does it not, and that's on the first page. It says:

"Let me repeat and renew the observations I made in my letter of October 16, 1975."

A: Yes, sir.

Q: Now, he did then provide some advice or information as early as October 16, 1975, did he not?

MR. ELDERKIN: Excuse me, Mr. Carver. If the Court please, we have been through this pretrial, and procedurally there was discovery along this line. We entered our objection to it. The Court sustained our objection that this involved privileged matter, and the Court sustained it on one condition, and that is we submit to the Court by affidavit form — not necessarily by affidavit form — whether or not that I had ever advised Mr. Carver concerning any of the factual background of this matter or had any factual input, and there is on file an affidavit in this cause that I furnished no factual information to Mr.

Carver in October or at any other time up to the time of the Miller & Lentz report, and that is a matter of record in this cause, and the Court, upon that condition, sustained our claim of privilege, which we claim now.

I would make a professional statement to the Court that in October of 1975, at the time that this letter was concerned, I did not furnish Mr. Carver with any outside information concerning the oil venture at all.

MR. McELHANEY: Is there an objection before the Court?

THE COURT: Yes. He's objected to it as privileged, and it's sustained. You can offer this exhibit, if you'd like.

MR. McELHANEY: Yes.

THE COURT: And that will be sufficient, because I think I can read the exhibit.

MR. McELHANEY: Yes, sir. I think it already has been offered, but out of caution let me re-offer the exhibit.

THE COURT: All right. It's received.

Q: (By Mr. McElhaney) Now, I would like to know, Mr. Carver, all of the business advice, all of the factual advice and all of the legal advice that you received from Mr. Elderkin initially during the period of time leading up to the formation of Holcar Oil Company.

MR. ELDERKIN: If the Court please, the objection to that, as I understand it, has been sustained.

THE COURT: It has been.

MR. McELHANEY: Your Honor, I realize that, and am in no way disrespectful about the Court's ruling. I'm just making a record.

THE COURT: All right. Make your record. And the objection is made and sustained.

MR. McELHANEY: All right, sir. And this will be a series of these same questions.

THE COURT: All right. And they will all be sustained.

MR. McELHANEY: Yes, sir.

THE COURT: The objection. And I'm going to rule now, too. I'm not going to wait. I'm not reserving it.

MR. McELHANEY: I understand. That's fine.

Q: (By Mr. McElhaney) And so the record will be clear, Mr. Carver —

THE COURT: Because I think every area that you've examined thus far has been gone into heretofore. Go ahead. I want that in the record, too.

APPENDIX M

APPENDIX M

Statement of the Issues

1. Whether the district court erred in precluding (a) pretrial discovery and (b) consideration during the trial, of suppressed advice Carver had from his own lawyers while claiming he relied upon Sedco.

(1) *Jack Winter, Inc. v. Koratron, Inc.*, 50 F.R.D. 225, 229 (N.D. Cal. 1970)

(2) *United States v. Woodall*, 438 F.2d 1317, 1324 (5th Cir. 1970) (en banc), *cert. den.* 403 U.S. 933 (1971)

(3) *Russell v. Curtin Matheson Scientific, Inc.*, 493 F. Supp. 456 (S.D. Tex. 1980)

(4) *Hearn v. Rhay*, 68 F.R.D. 574, 581, 582 (E.D. Wash. 1975)

APPENDIX N

APPENDIX N

Iowa Code § 622.10 Communications in professional confidence — exceptions — application to court

No practicing attorney, counselor, physician, surgeon, or the stenographer or confidential clerk of any such person, who obtains such information by reason of his employment, minister of the gospel or priest of any denomination shall be allowed, in giving testimony, to disclose any confidential communication properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline. Such prohibition shall not apply to cases where the person in whose favor the same is made waives the rights conferred; nor shall such prohibition apply, as the same relates to physicians or surgeons or to the stenographer or confidential clerk of any such physicians or surgeons, in a civil action to recover damages for personal injuries or wrongful death in which the condition of the person in whose favor such prohibition is made is an element or factor of the claim or defense of such person or of any party claiming through or under such person. Such evidence shall be admissible upon trial of the action only as it relates to the condition alleged. If an adverse party desires the oral deposition, either discovery or evidentiary, of any such physician or surgeon to which such prohibition would otherwise apply or the stenographer or confidential clerk of any such physician or surgeon or desires to call any such physician or surgeon to which such prohibition would otherwise apply or the stenographer or confidential clerk of any such physician or surgeon as a witness at the trial of the action, he shall file an application with the court for permission to do so. The court upon hearing, which shall not be ex parte, shall

grant such permission unless the court finds that the evidence sought does not relate to the condition alleged and shall fix a reasonable fee to be paid to such physician or surgeon by the party taking the deposition or calling the witness ...